A.E.R. 17

HIGH COURT OF CHHATTISGARH, BILASPUR

Division Bench : Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ

Criminal Appeal No. 1185 of 2001

Amru

Vs.

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
JUDGE
12-9-2007

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

I Agree.

Sd/-
Sunil Kumar Sinha
Judge

POST FOR PRONOUNCEMENT OF JUDGMENT ON 14th SEPTEMBER, 2007

Sd/-
L.C. Bhadoo
Judge

(18)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1185 of 2001

APPELLANT:	Amru, Son of Shivcharan Gond, Caste – Scheduled Tribe, Aged 25 years R/o Duppi, Police Station Rajpur, District Surguja, Ambikapur (Chhattisgarh)
-Versus-	
RESPONDENT:	State of Chhattisgarh, Through Police Station Rajpur, District Surguja, Ambikapur (Chhattisgarh)

Present: -

Shri R.P. Tripathi, Advocate: For the appellant.

Shri U.K.S. Chandel, Panel Lawyer: For the State.

DIVISION BENCH*: -

HON'BLE SHRI L.C. BHADOO AND

HON'BLE SHRI SUNIL KUMAR SINHA, JJ.

J U D G M E N T

(Delivered on 19th September, 2007)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J***: -

1. By this appeal under Section 374 (2) of the Cr.P.C. the accused/appellant has questioned legality & correctness of the judgment of conviction & order of sentence dated 20th November, 2001, passed by the 3rd Additional Sessions Judge, Ambikapur in S.T. No.433/2000 whereby the learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Sections 307 & 302 of the I.P.C., for attempting to commit murder of his wife namely, Khoiti Bai & committing the murder of his son Karamsai aged about 10 months, sentenced him to undergo R.I. for 5 years & to undergo imprisonment for life, respectively. It was further directed that both the sentences shall run concurrently.

2. The case of the prosecution, in brief, is that Khoiti Bai (PW-5) was married to the accused/appellant & there was son Karamsai, aged about 10 months, out of the wedlock. Their relations became strain, as the accused did not want to keep Khoiti Bai, therefore, Khoiti Bai filed a case in the Court. After

7 months, the matter was compromised. Khoiti Bai started residing with the accused in village Duppi. On the fateful day i.e. 2-10-2000, on the occasion of Nayakhani festival, father of Khoiti Bai invited them on feast, therefore, Khoiti Bai & the accused along with their 10 months child were going to village Markadadh. When they were on the way in the forest of Dhandhapur, the accused attacked twice his wife Khoiti Bai on the back side of her neck with knife with intention to cause her death, as a result of which Khoiti Bai sustained injuries on the neck & her 10 months old child Karamsai fell down. The accused turned towards Karamsai and attacked him with same knife on his neck. In order to save her life, Khoiti Bai ran away from the place of occurrence & informed villagers Ramlaxman (PW-1) & others. After providing water to her, he took her to the Police Station Rajpur where Khoiti Bai lodged first information report Ex.P/19 in the said police station.

3. Assistant Sub Inspector S.L. Kaushik after registering offence under Section 307 of the I.P.C. took up investigation. The investigating officer after giving notice Ex.P/3 to the Panchas, prepared inquest Ex.P/4 on the body of Karamsai. While in the police custody, the accused gave memorandum Ex.P/6, in pursuance of that, knife stained with blood, weapon of offence, was seized under Ex.P/5. One full shirt and one Lungi stained with blood of the accused were seized under Ex.P/7. One Hero cycle was seized under Ex.P/8. Articles which were lying on the spot were seized under Ex.P/9. Blood stained clothes of injured Khoiti Bai were seized under Ex.P/10. Clothes of the child were seized under Ex.P/11. The body of Karamsai was sent for postmortem examination to the Government Hospital, Rajpur under Ex.P/12-A where Dr. Pritam Ram conducted postmortem & opined that cause of death of Karamsai was syncope due to severe haemorrhage from incised wound on neck. He further opined that death was homicidal in nature. Khoiti Bai was also sent for medical examination under Ex.P/13. Dr. Pritam Ram examined her injuries. He noticed 2 incised wounds on neck. He prepared injury report Ex.P/13-A. Knife in question was also sent for examination to Dr. Pritam Ram, who after examination of knife, prepared report Ex.P/14-A & opined that injuries found on the bodies of Khoiti Bai & Karamsai could be caused by the said knife. Seized articles were sent for chemical examination to Forensic Science Laboratory, Sagar from where report Ex.P/29 was received.

4. After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, 1st Class, Ambikapur, who in turn committed the case to the Sessions Judge, Ambikapur from where learned Additional Sessions Judge received the case on transfer for trial.

5. In order to establish the charges against the accused the prosecution examined 12 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. in which he denied material appearing against him in the prosecution evidence.

6. Learned Additional Sessions Judge after hearing learned counsel for the respective parties convicted and sentenced the accused as aforementioned.

7. We have heard Shri R.P. Tripathi, counsel for the appellant and Shri U.K.S. Chandel, Panel Lawyer for the State.

8. Shri Tripathi, learned counsel for the appellant, has not disputed homicidal death of Karamsai. Moreover, PW-5 Khoiti Bai, injured witness, mother of the deceased & wife of the accused has categorically stated that the accused attacked Karamsai with knife on his neck, as a result of which he succumbed to the injuries instantaneously. The above ocular evidence of Khoiti Bai is corroborated by the medical evidence of Dr. Pritam Ram, who conducted postmortem on the body of Karamsai on 3-10-2000. He has stated that there was incised wound on the neck of Karamsai. Muscles, trachea, oesophagus, cervical bone, all the nerves & blood vessels were cut. There was incised wound on the left hand in the size of 3 x 1 cm bone deep. Margins were regular. Cause of death was syncope on account of haemorrhage, as a result of neck injury. Death was homicidal in nature. Therefore, in view of the above ocular and medical evidence, it is established that death of the deceased was homicidal in nature.

9. As far as involvement of the accused/appellant in the crime in question is concerned, PW-1 Ramlaxman and PW-5 Khoiti Bai have been examined by the prosecution as eyewitnesses. PW-1 Ramlaxman has stated that at about 5-6 p.m. in the evening he went in the forest to collect grass. He heard cries of a boy. When he saw towards that side, accused Amru was attacking him with knife on his neck. Wife of the accused ran towards the vicinity. There is improvement in the Court evidence of this witness because in his statement Ex.D/1 under Section 161 Cr.P.C. made before

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investigating officer, he had not stated that he witnessed the accused attacking the deceased with knife. Therefore, the evidence of this witness to that extent that he witnessed the crime while the accused was attacking the deceased cannot be believed because 161 statement is foundation of the prosecution case. If any witness deposes contrary to that in his Court evidence, same cannot be relied. Therefore, evidence of Ramlaxman is of no avail to the prosecution because his evidence cannot be relied upon, as his evidence does not inspire confidence of the Court on account of improvement made in his evidence before the Court, that leaves us to scrutinize evidence of Khoiti Bai (PW-5) mother of the deceased and wife of the accused. She has stated that on the fateful day she was going to her father's house along with son and the accused, as they were invited on feast on the occasion of Nayakhani festival. The boy was in her lap. They were walking on the foot. The accused was having a cycle with him. When they were in the forest, the accused caught her hand, started pulling her, thereafter, he attacked on her chest with fists, as a result of which she fell down on the ground. The boy also fell down on the ground. The accused attacked her with knife on the neck, thereafter he attacked on the neck of her child with same knife and committed his murder. She ran towards vicinity of village Lodhidhad. She raised cries. She became unconscious and fell down. She regained consciousness after some time. The accused inflicted injury with knife on her neck. People of Lodhidhad took her to Rajpur Police Station & from there to the hospital.

10. In cross-examination, she has stated that police had not enquired anything. She became unconscious. She did not give report. She did not know that her thumb impression was obtained. She did not know if anybody else had given report. Even she denied that police case diary statement Ex.D/2 was given by her. On further cross-examination, she has stated that it is incorrect to say that the accused had not attacked her and her son. As her son was attacked, she ran away leaving her son behind. She has further stated that it is incorrect that the accused did not attack her. It is also incorrect to say that there was darkness at that time, therefore, she was not able to see.

11. Learned counsel for the accused/appellant argued that in view of the above categorical evidence of this witness, in cross-examination she has denied giving of any statement to police, therefore, her evidence cannot be believed.

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12. In order to appreciate argument of learned counsel for the accused/ appellant we have examined record. This witness has stated that when the accused attacked her son, she ran towards village Lodhidhad, there she raised cries and fell down. PW-1 Ramlaxman, who is villager of village Lodhidhad, has corroborated the above evidence of this witness Khoiti Bai. He has stated that there was injury on the neck of Khoiti Bai. They picked up her and took her to the police station, from there she was taken to the hospital. He attended her in the hospital also.

13. PW-10 S.L. Kaushik, Assistant Sub Inspector, has stated that on 2-10-2000 he was working as ASI in the police station Rajpur. On that day Khoiti Bai lodged first information report Ex.P/19 in the police station, that was registered by him, place A to A bears his signatures. He obtained thumb impression of Khoiti Bai. Offence was registered under Section 307 of the I.P.C. These two witnesses namely, Ramlaxman and Khoiti Bai have stated that people took Khoiti Bai to the Police Station where report was lodged, from there she was taken to the hospital. PW-10 S.L. Kaushik, Assistant Sub Inspector, who registered FIR (Ex.P/19) has also categorically stated that he registered first information report Ex.P/19 on the information given by Khoiti Bai. In cross-examination of these two witnesses, defence has not been able to elicit any circumstance which discredit evidence of these two witnesses on this count. Khoiti Bai is an injured witness. She was taken to the hospital where her injuries were examined. The doctor noticed 2 incised wounds on her neck. Injury report is Ex.P/13-A. Khoiti Bai is an illiterate, poor rustic villager & she affixed her thumb impression only on the first information report Ex.P/19. She may not be understanding what is statement, what is report. Therefore, she has stated like that in cross-examination. When she was cross-examined on the aspect of attack made by the accused on her neck, she has categorically stated that the accused made attack. It appears that at the time of cross-examination the Presiding Judge of the trial Court was not attentive & alive. It was his duty to first explain things to her in local language. He ought to have enquired from her as to whether she was taken to the police station and she narrated anything there. Time and again, the Apex Court and the High Courts are continuously impressing upon the trial Courts that at the time of recording evidence, particularly, in the serious offences, the Presiding Officer of the Court must remain alive. He cannot sit as a silent spectator. He has to participate in the proceedings & he is required to intervene in the proceedings as and when he reaches to

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the conclusion that witness is not able to understand technical question put by the defence counsel or the prosecution. The Presiding Officer is duty bound to explain to the witness in simple language and try to ascertain correct thing from him.

14. From the evidence of Ramlaxman, ASI S.L. Kaushik (PW-10) & even from further cross-examination of PW-5 Khoiti Bai it becomes clear that she was taken to the police station, report was lodged by her & ASI Kaushik has stated that thumb impression of Khoiti Bai was affixed on first information report Ex.P/19. Therefore, we do not find any substance in the argument that on account of para-6 of cross-examination of the evidence of Khoiti Bai, her evidence cannot be believed. Khoiti Bai has categorically stated that on the fateful day she along with her husband and their son left for her parents' house to attend feast which was organized by her father on the occasion of Nayakhani festival. Whatever she has stated that finds corroboration from the medical evidence and injuries found on her body. In the ordinary circumstance, no lady would like to implicate her husband in a false case that too for committing the murder of their own son. On the one hand, she had lost her son then why she would like to lose her husband also by implicating him in a false case. The defence counsel in her cross-examination has not been able to bring on record any fact which throw light that whatever stated by this witness was not correct. Therefore, in the facts and circumstances of the case, judgment of Supreme Court cited by learned counsel for the accused/appellant in the matter of **Niranjan V. State (Delhi Adm.)**[1]is of no help to the appellant, as same is distinguishable on facts. In that case, even testimony of PW-1, injured witness, was not believed by the Apex Court on the ground that he was in an inebriated condition. He was taken to the hospital in the night. The doctor examined him and found that there was smell of alcohol in his mouth. The doctor advised that he would be in a position to give a statement only by 12.50 a.m. The Court held that therefore, in the circumstances, he was not "wholly reliable" witness because he was not in a position to grasp the entire gamut of the incident with all details at the time when the incident happened because of his peculiar condition then as the visibility was also slightly affected. The incident happened in the night and there was only electric light to provide him visibility. In the circumstances, lodger of the FIR PW-8, who disowned it, was declared hostile.

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[1] 2000(II) MPWN 177

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15. Facts of the present case are entirely different. The accused is the husband of PW-5 Khoiti Bai. They left the house together. They were going to the parents' house of PW-5. She is an injured witness, therefore, her evidence inspire confidence of the Court. Moreover, evidence of PW-5 is also corroborated by the circumstantial evidence i.e. blood stained clothes of the accused, Lungi was seized, as per the FSL report, same was found stained with human blood, even knife which was seized from the accused was also found stained with human blood.

16. Learned counsel for the accused/appellant argued that there is no serologist report that the blood which was found on Lungi of the accused and knife, weapon of offence, was of the blood group of the deceased.

17. It is true that there is no such report but fact remains that human blood was found on these two articles as also on the clothes of Khoiti Bai. That is not a sole circumstance based on which conviction of the accused has been sought. This is a corroborative piece of evidence that is why it can be used. Had it been the sole circumstance to connect the accused with the crime in question & there was no report of the serologist regarding blood group of the blood found on these two articles, then definitely the Court would have hesitated in convicting the accused mainly on this circumstance. This is a corroborative piece of evidence & support can be taken from this report.

18. Moreover, the Apex Court in the matter of **State of Rajasthan V. Teja Ram and others**[2] held that:-

> "Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that the blood stuck on the axe would not have been human blood at all. Some times it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such guess work that on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains

[2] (1999) 3 SCC 507

with some objectivity, no benefit can be claimed by the accused.

It cannot be said that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility."

19. Learned counsel for the accused/appellant also questioned recovery of the knife. He argued that as per the recovery memo Ex.P/5, knife was produced by the accused on 5-10-2000, the incident was of 2-10-2000, therefore, it is difficult to perceive and believe that the accused was carrying weapon for 3 days with him.

20. In the first instance, the argument advanced by learned counsel for the appellant seems to be impressive, but if it is put to the close scrutiny, then it cannot be said that it is highly impossible for a person to keep knife with him for 3 days. Knife was taken by the accused from his house when he along with his wife and child were going to the parents' house of his wife, on the way, in the forest, he attacked his wife and ran away. It depends upon person to person how he will behave and act in a particular situation. Depending on the situation in the given case every person behaves and reacts in his own manner. As the knife was taken by the accused from his house & knife was not of a big size, it was not difficult for him to carry knife with him. Moreover, Roopan (PW-6), who is the resident of village Dhandhapur, has stated that knife was given by the accused after taking out from his attire. Ex.P/5 was prepared which bears his signatures at A to A. However, regarding memorandum Ex.P/6 he has stated that no such information was given by him. Even otherwise, memorandum is irrelevant in this case because memorandum is given by the accused regarding the fact discovered when the accused himself produced knife after taking it out from his attire. There was no question of memorandum in this case. Even if this witness has not proved the memorandum, this fact did not affect the case of the prosecution. PW-12 Narsingh Ram, sub inspector, took into possession knife in question under Ex.P/5. He has stated that the accused took out knife from his attire and gave to him. He seized the knife under Ex.P/5. Therefore, in view of the evidence of Roopan and I.O., we are of the considered opinion that knife in question was seized from the possession of the accused. Hence, evidence of PW-5 Khoiti Bai is corroborated by circumstantial evidence that human blood was found on the

knife, weapon of offence, as also on the clothes of the accused i.e. Lungi and of Khoiti Bai. Knife was also seized from the accused. Therefore, involvement of the accused based on ocular evidence of PW-5 Khoiti Bai & circumstantial evidence i.e. human blood was found on the knife & on lungi of the accused, knife was recovered from the accused stands established. To this extent, we do not find any illegality or infirmity in the judgment of the trial Court.

21. Learned counsel for the accused/appellant argued that in this case there is no evidence that when first information report was sent to the concerned Magistrate, therefore, prosecution case fails.

22. In this connection, Section 157 Cr.P.C. envisages that 'If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report'. The Apex Court in the matter of **Mehraj Singh V. State of U.P.**[3] observed that:

> "FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at

[3] 1994 (5) SCC 188

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the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate.

23. In view of the above principle enunciated by the Apex Court, it is no doubt that sending of copy of FIR to the local Magistrate is vital part of the investigation & this provision has been inserted by Legislature with an objective to have check on the action of the investigation agency so that false implication can be avoided. But, it is difficult to hold that in all cases in which there is delay in dispatching FIR, then in all cases there is false implication and prosecution case should be thrown out on this count. Often, it has been observed that on account of lack of sincerity and devotion to the duty, many a times, FIR is not sent in time, in such circumstances, it is the duty of the Court to scrutinize the matter with care and circumspection. If there is delay in dispatching FIR, then Court has to scrutinize the prosecution evidence with more care and circumspection in order to ascertain veracity of the evidence adduced by the prosecution.

24. In the matter of **Ravi Kumar V. State of Punjab**[4] the Apex Court held that:

> "Sending the copy of the special report to the Magistrate as required under Section 157 Cr.P.C. is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the Court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in Section 157 Cr.P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the Court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not."

[4] (2005) 9 SCC 315

(28)

25. Similarly, in the matter of **A.N. Venkatesh & another V. State of Karnataka**[5] the Apex Court held that:

> "Section 157 Cr.P.C. makes it obligatory on the officer in charge of the police station to send the information to the Magistrate's Court forthwith but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Unless, evidence led by the prosecution is not reliable, the delay in sending the first complaint would not lead to the inference that the complaint lodged of missing person contained some other facts that may have revealed some other story which is not consistent with the prosecution case."

26. In the matter of **Rabindra Mahto and another V. State of Jharkhand**[6] & connected appeals, the Apex Court held that:

> "Section 157 Cr.P.C. requires sending of an FIR to the Magistrate forthwith. The reason is obvious to avoid any possibility of improvement in the prosecution story and also to enable the Magistrate to have a watch on the progress of the investigation. At the same time, this lacuna on the part of the prosecution would not be the sole basis for throwing out the entire prosecution case being fabricated if the prosecution had produced the reliable evidence to prove the guilt of the accused persons. The provisions of Section 157 Cr.P.C. are for the purpose of having a fair trial without there being any chance of fabrication or introduction of the fact at the subsequent stage of investigation."

27. On the above principle, if we examine facts of the present case, in the first instance, defence counsel has not cross-examined investigating officer PW-10 S.L. Kaushik that when FIR was sent, why it was delayed, whether he was in a position to explain satisfactorily. Without cross-examining him at the appellate stage this point has been raised, therefore, in all darkness, this Court cannot jump over conclusion that delay for not sending FIR to the Magistrate was a deliberate attempt and false case has been foisted upon the accused. As has been discussed earlier, in this case crime was

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[5] (2005) 7 SCC 714
[6] (2006) 10 SCC 432

committed in peculiar facts and circumstances. In this case, the accused is the father of the deceased i.e. 10 months' old child & injured eyewitness has categorically deposed that on the fateful day she along with her husband & child were going to her parents' house to attend feast on the occasion of Nayakhani, on the way, in the forest, the accused attacked her with knife, as per the medical report, two injuries were found on her neck, she has further stated that when child fell down on the ground, the accused attacked 10 months child with knife on his neck, as a result of which he died instantaneously. As per the discussion and scrutiny of the evidence in the earlier part of this judgment, it is established that evidence of this witness is wholly reliable and inspire confidence of the Court, therefore, in the given circumstances, case of the prosecution cannot be thrown out merely on the ground that there was delay in dispatching FIR to the Magistrate.

28. Learned counsel for the accused/appellant has not argued on the aspect of conviction under Section 307 of the IPC. Moreover, as per the evidence of PW-5 Khoiti, the accused attacked her with knife on her neck, as a result of which she sustained 2 incised wounds, thereafter, he attacked her son with knife on his neck, as a result of which he sustained injuries & died instantaneously. Therefore, the accused attacked his wife on her neck with knife, that was vital organ of the body & weapon was dangerous, with the same weapon, the accused committed the murder of Karam Sai. Intention can be gathered from the manner in which the accused attacked, weapon with which he attacked, place of the body where he attacked, looking to the manner in which he attacked with deadly weapon like knife on the neck of Khoiti Bai, intention of the accused to cause death of Khoiti Bai was writ large. In order to convict the accused under Section 307 of the IPC, as per the settled law, intention of the accused has to be gathered whether he attacked with intention to cause his death. In the matter of **R. Prakash v. State of Karnataka**[7] the Apex Court held that:

> "It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted."

29. In the instant case, the victim could manage to escape from the place of occurrence, the nature of injuries, place where he attacked, intention of the accused is established that he attacked Khoiti Bai with intention to cause

[7] 2004 AIR SCW 815

her death. Therefore, the accused has rightly been convicted under Section 307 of the I.P.C.

30. In the result, we do not find any substance in this appeal being devoid of merit, same is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge

Barve